No. 20,228

United States Court of Appeals

For the Ninth Circuit

GREAT WESTERN LAND AND DEVELOPMENT, INC., et al.,
Appellants,

vs.

SECURITIES AND EXCHANGE COMMISSION,
Appellee.

Appeal from the United States District Court for the District of Arizona

APPELLANTS' REPLY BRIEF

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INTRODUCTION

It is rewarding to observe that, albeit appellee makes a counter statement of the case consisting of 13 pages and 14 footnotes, not one fact set forth in appellants' statement of the case has been controverted. Numerous conclusions, interpretations, additions and mis-statements have been indulged in. However, it would appear unnecessary to lengthen this reply brief by pointing out these discrepancies as they will appear obvious from the record. Furthermore, the statements have been made with utter disregard of the rule requiring the facts to be set forth most favorable to these appellants.

Appellee, for reasons which are not apparent, has made little effort to address itself to the issues or to refute the authorities presented. In the alternative, it has chosen to assert its own views as to why this appeal has been taken.

The failure to respond is a tacit admission of the correctness of the points and authorities presented and apparently a lengthy argument has been substituted with the hope that the true issues and the authorities supporting them will be overlooked. Appellants thus feel compelled to respond to the argument.

Emphasis herein will be ours unless otherwise indicated.

ARGUMENT

I

THE TRIAL COURT WAS IN ERROR IN GRANTING SUMMARY JUDGMENT WHERE UNCONTROVERTED FACTS ESTABLISH APPELLANTS WERE NOT THEN USING, NOR DID THEY INTEND ANY FUTURE USE OF MAILS OR OTHER MEANS OR INSTRUMENTS OF TRANSPORTATION OR COMMUNICATION IN INTERSTATE COMMERCE IN THE MANNER COMPLAINED OF.

A. Summary judgment is improper where the undisputed material facts fail to support it.

Appellee's complaint for injunction is based upon the following material allegations:

1) "It appears to plaintiffs that defendants *are engaged or about to engage in acts and practices* which constitute violations of Section 5 (a) and 5(c) of the Securities Act of 1933, as amended, 15 USC 77 E (a) and 77 E (c)." (R.1 p. 1.)

2) That defendants "have been and *are now directly and indirectly making use* of means and instruments of transportation and communication in interstate commerce and of the mails to sell and offer to sell such securities *and causing them to be carried through the mails and in interstate commerce* by means and instruments of transportation for the purpose of sale and delivery after sale." (R.1 p. 2.)

Notwithstanding these allegations, appellee now urges that it is entitled to injunctive relief by merely establishing "that the appellants *offered and sold* securities by means of the mails without required registration with the commission." (AB p. 17.)* Appellants feel this position is untenable and that this court may not grant a permanent injunction until appellee presents evidence of *present and contemplated future use* of the mails or other methods of interstate transportation, as alleged.

A review of the affidavits, relied on by the appellee, fails to disclose a single statement that the appellants, or any one of them, were *at that time using or threatening future use* of the mails or any other instruments of transportation or communication in interstate commerce.

On the other hand, the uncontroverted affidavits of Wayne H. Allen, William W. Arnett and Chester J. Peterson establish that *no such use was occurring,* that *none had taken place since the filing* of the com-

*AB refers to Appellee's Brief filed herein.

plaint and *that none was contemplated in the future* by any of the appellants.

> "Where injunctional relief is sought because of repeated and continuous breaches of duty or violations of law, *the evidence must show that such violations, if not prevented, will occur in the future.*" (*Shore v. U.S.,* 282 F. 857.)

It will be recalled that appellants, in their Answer, denied the allegations of the complaint.

It is submitted that these denials placed upon appellee the burden of establishing the truth of the allegations before becoming entitled to a permanent injunction as a matter of law. (*Hawks v. Hamill,* 53 S.Ct 240; *United States v. Tilley,* 124 F.2d 850 (8th Cir. 1942).)

B. The uncontroverted facts do not establish violations of Section 5 (a) and (c) of the Securities Act.

As appellants understand the law, it is not the issuance or sale of a security that may be enjoined, but is the future use of the mails or other means of transportation or communication in interstate commerce. (*Little v. U.S.,* 331 F.2d 287 (2nd Cir. 1964); *Harper v. U.S.,* 143 F.2d 795, 801 (8th Cir. 1944).)

The issue raised by this appeal is not the characteristics of the contracts but is whether or not the appellee has established the present or future use of the mails or other means of transportation or communication in the sale or delivery thereof. To the present moment there has been no hearing or opportunity to present evidence as to whether or not the documents

questioned by the appellee actually constitute a security under the Securities Act. As a matter of fact, Mrs. Sally E. Arie, in her affidavit, refers to *"the land which we were going to buy",* also stating she received through the mails "a description of *the land I purchased."* Arthur H. Hutton's affidavit refers to *"sales of* undivided interest in *specific parcels of real property."* (R. 3.)

Furthermore, reference to "the agreement" between Sally Arie and Neve-Allen Land & Investment, Inc. will reflect that Mrs. Arie's only expectation of profit was to come from the sale of *the land,* which she purchased, at so much *per acre.* (R. 3.)

It has long been established that the mere conveyance of a fractional interest in specific parcels of real property does not come under the regulation of the securities statute, nor is a transaction considered a security when the buyer must look "only to the thing bought" to produce a profit for himself. (*Oil Lease Service Inc. v. Stephenson,* 327 P.2d 628, 633 (Cal. 1958); *Sec. v. Bailey,* 41 F.Supp. 647 (1947); *Blackwell v. Bentson,* 203 F.2d 690, 693 (1953); *Union Land Associates v. Ussher,* 149 P.2d 568, 570 (1944).)

It will thus appear that the question of whether or not the documents used by appellants constitute a security has not been settled and remains in issue, beclouded even by the statements contained in appellee's affidavits. However, as pointed out above, appellants feel that this fact is immaterial to the primary issue as to whether or not appellants may be enjoined

from doing something which they are not now doing and which they never intend to do in the future.

Appellee, rather than meeting the points and answering the authorities set forth under heading II of the appellants' brief (Br. p. 9), engages in a diatribe which exhibits a lack of understanding or a deliberate evasion of the points raised. (AB p. 22-27.)

Appellee now asserts that the affidavits of Hutton & Ziering "were offered to show the manner in which the appellants' investment plan was set up and the extent to which appellants had actually sold fractional trust interests—subjects on which there was ample other evidence in any event." (AB p. 24.)

If this is the purpose for which the affidavits and documents were submitted they are completely contrary to the provisions of Rule 56(e) which provides *"and shall show affirmatively that the affiant is competent to testify to the matters stated therein."* It seems beyond question that neither Hutton nor Ziering are competent to testify as to the manner in which the appellants' investment plan was set up or as to the extent to which appellants had actually sold fractional trust interests. Their statements on these questions would be the rankest hearsay. We are unaware of the "ample other evidence" referred to.

We cannot agree that appellants by pointing out this failure to comply with the rules of court and by suggesting that the affidavits of the Aries, Goettlinger and Mattison do not show present or threatened future use of the mails, "are indulging in a meaningless quibble regarding a totally irrelevant matter."

It is appellants' belief that appellee must show the present or threatened future use of the mails or other interstate transportation in order to establish its right to an injunction and that any such use must be traced directly to the appellants and each of them.

Appellee has apparently not carefully read the authorities cited in its brief for it will be noted that in *Thomas v. U.S.,* 227 F.2d 667, 670 (CA 9, 1955), the person using the mails did so *on the instructions of those being charged* with the crime. In *Keith, Inc. v. Willingham,* 264 F.2d 76, 81 (CA 8, 1959) the payment through the mail was made *pursuant to the terms of an agreement* prepared and entered into by the parties, and in *Mansfield v. U.S.,* 155 F.2d 952, 955 (CA 5, 1946), the court pointed out it must appear the *use of the mails were necessary* in completion of the scheme in order to violate the statute and in order to charge the crime. In the last case, *Little v. U.S.,* 331 F.2d 287 (CA 8, 1964), the defendant *sent checks through his bank for clearance through another bank which necessarily caused the mails to be used.* Each of these cases draws attention to the fact that it is necessary to establish that the person being charged is the one who deputized or authorized the party using the mails so to do.

Appellee's argument shows the injustice which could be practiced upon litigants in motions for summary judgment if the rules of law are not strictly adhered to.

C. When findings of fact and conclusions of law are made they must comply with Rule 52 of the Federal Rules of Civil Procedure.

It is most difficult to determine whether the appellee really misunderstands, fails to read, or intentionally disregards the issues urged in Appellants' Opening Brief.

The question is not whether the District Court was forced to make findings of fact and conclusions of law, it is whether or not the findings and conclusions actually made conform to the rules of law governing them. The rule does provide for similar findings of fact and conclusions of law in granting or refusing interlocutory injunctions and the Third Circuit in the case of *Hook v. Ackerman, Inc.,* 213 F.2d 122, 1954, stated as follows:

> "Rule 52(a), FRCP, requires the District Court to 'find the facts specifically and state separately its conclusion of laws thereon in two specified situations; "in all actions tried upon the facts without a jury or with an advisory jury" and "in granting or refusing interlocutory injunctions" '. *A permanent injunction,* when issues of fact determine whether or not it should be granted, *comes within the quoted scope of Rule 52.* Generally speaking, findings of fact should be made in connection with decisions of the District Court when the decision turns upon questions of fact, as distinguished from questions of law. See Moore's Federal Practice, Vol. 5, page 2662 et seq."

The authorities relied upon by appellants are set forth under subheading III of the Opening Brief. They are clear, unambiguous and have not been

controverted or answered by appellee. In addition, appellee has failed to follow the requirements of Rule 18 (3) of this Court, as amended, which provides as follows:

> "When findings are specified as error in the appellants' brief, and such specification is argued therein, the *appellee's brief shall contain record references to the evidence relied upon by the appellee as supporting the challenged finding.*"

Appellants submit that their specification of error as to the District Court's findings of fact was properly argued in the Opening Brief and that the specified error stands admitted by appellee's failure to comply with the provisions of Rule 18 (3) of this Court, as amended.

II

THE GRANTING OF A SUMMARY JUDGMENT BY A DISTRICT COURT IS NOT A MATTER OF DISCRETION.

A. Introduction.

Rule 56(c) provides in part as follows:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and *that the moving party is entitled to a judgment as a matter of law.*"

As appellants understand this rule, it does not leave any discretion in the District Court in the granting of a summary judgment. Such a judgment may only be

entered when there *"is no genuine issue as to any material fact"* and when *"the moving party is entitled to a judgment as a matter of law"*. With this in mind, we will briefly address ourselves to the remaining subdivisions under this heading.

B. Appellants had discontinued all of the practices objected to by appellee prior to the time appellee started its investigation and prior to the time when appellee filed its complaint herein.

As has been pointed out, the affidavits of the appellants, taken most favorable in their behalf, clearly establish that the violations complained of by appellee had been discontinued prior to the time when Mr. Arthur H. Hutton contacted the appellants and that they were not being practiced at the time the complaint was filed. In addition, these affidavits further show that the said practices have not been entered into since the complaint was filed and that the appellants never intend to enter into such practices in the future.

Appellee expended one-third of its brief and added 8 footnotes in an attempt to indicate that the District Court had a right to disregard these uncontroverted facts, and to conclude that appellants' affiants are dishonest, perjurers who reserve the secret intent to renew their activities as soon as the preliminary injunction is no longer in effect. Appellee has also intimated that the District Court has the right under a motion for summary judgment to determine against the credibility of witnesses never seen or heard, glean presumptions from an incomplete record, construe the affidavits and pleadings in a light most favorable to

appellee and to otherwise disregard any and all rules of law or procedure which would in any way hamper its desire to obtain a permanent injunction against these apparently despised appellants.

Fortunately for appellants, such disregard of the rules of law and justice is not the normal procedure in the courts of this land as was pointed out in the case of *Fugua v. Deapo,* 34 F.R.D. 111 (1964):

> "A summary judgment should be based on *evidence which a jury would not be at liberty to disbelieve* and which requires a directed verdict for the moving party. *It is not the trial court's function to pass upon credibility in evaluating the evidentiary material* in support of and in objection to a motion for summary judgment where the issue of capability would properly be for a jury. (See Moore's Federal Prac. 2d Ed, pg 3032.)"

Appellants submit that the facts as they stand uncontroverted before the court at the present time would require a court to direct a verdict in favor of the appellants.

For this reason we submit that the summary judgment of permanent injunction was improper and that the judgment should have been for appellants.

C. Dissolution of corporate appellants does bar injunctive relief where injunctive relief is based on activities of such corporations.

The appellee cites numerous cases under this heading, none of which were determined by summary judgment. In reply we again draw attention to the

case of *U.S. v. W. T. Grant Co.,* 345 U.S. 629, 633, 73 S.Ct. 894, 897, 97 L.Ed. 1303, where the Supreme Court of the United States stated:

> "But the *moving party must satisfy the court that relief is needed.* The necessary determination is that there exists some cognizable danger of return violation, *something more than the mere possibility* which serves to keep the case alive."

It is appellants' position that the trial court, when faced with the uncontroverted affidavit that the appellant corporations neither own property, nor are active; that they have no separate existence apart from the corporation into which they merged; that Great Western Land & Development, Inc., although having separate corporate existence, does not have a broker's license, is not conducting any sales or promotional activities, is inactive and not intended to be reactivated; that Wayne H. Allen and E. J. Neve no longer own any interest or have any stock in said corporations and have been disassociated with them since 1962; that these individuals are not and have not been engaging in any of the complained of activities since prior to the time when appellee's complaint was filed, did not have evidence to support a finding that relief was needed or that there existed some cognizable danger of recurrent violation. In all of the cases cited by the appellee there had been a hearing where the court had seen and heard the evidence, at which time the court had the necessary information to determine the bona fides of the expressed intent to comply and to determine the effectiveness of the discontinuance.

Appellants feel that the only facts before the court at the present time conclusively establish these points in favor of the appellants and leave the trial court no discretion, particularly under the obligations placed upon the court by the provisions of Rule 56(e).

CONCLUSION

In conclusion appellants would point out that appellee has made no effort to answer subsection VI of the Opening Brief, pages 25 to 26, apparently conceding that the summary judgment of permanent injunction has not been drawn in conformity with the rules of 65(h) of the Rules of Civil Procedure.

Instead of answering the authorities submitted in the Opening Brief, or meeting the issues raised by appellants, appellee concludes:

> "In the context of the entire record, we believe that the District Court best served the public interest by entering summary judgment of permanent injunction as to both the individuals and corporate appellants, even though the primary danger to the investing public arises from the likelihood that the individual appellants will resume their unlawful course of conduct."

Appellants submit that it is not a question of what best serves the public interest, but it is a question of what the court should do under the uncontroverted facts and the established rules of law. Appellants feel that the record in this case establishes that the appellee has failed to present undisputed facts sup-

porting the allegations of its complaint and that the facts taken most favorable to the appellants show that the appellee is not entitled to a summary judgment of permanent injunction.

Appellants feel that the undisputed facts show that appellants are not at this time using the mails or other means of transportation in interstate commerce, nor is such use threatened in the future. Therefore, the judgment of the trial court should be reversed with instructions to grant judgment in favor of the appellants.

Dated, Phoenix, Arizona,
October 12, 1965.

Respectfully submitted,
RAWLINS, ELLIS, BURRUS & KIEWIT,
By CHESTER J. PETERSON,
Attorneys for Appellants.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CHESTER J. PETERSON,
Attorney for Appellants.